

# Poland's Constitutional Tribunal under PiS control descends into legal chaos

 [verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/](http://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/)

Marcin Matczak Mi 11 Jan 2017

Mi 11 Jan  
2017

December 2016 brought some new developments in the Polish constitutional crisis. Judge Rzepliński stepped down from the court and a new set of three statutes was introduced to allow Law and Justice (Prawo i Sprawiedliwość, PiS) to take over full control over Poland's constitutional court, the Constitutional Tribunal (CT). The statutes gave President Duda the right to appoint a Commissioner to carry out the election of the new President of the CT, bypassing the constitutionally enshrined right of the Vice-President to do so. The general public in Poland expected the "old" judges and Vice-President Biernat to strongly and publicly oppose the introduction of this Commissioner (Judge Przylebska, elected by Law and Justice) and the related usurpation of power, but were disappointed. It seems that Judge Biernat has opted for a strategy of passive resistance (more on this below).

Przylebska's first action as Commissioner was to allow the three "anti-judges" (Cioch, Morawski and Muszynski) to assume their judicial duties and participate in the meeting to appoint a new President of the CT. Numerous controversies resulted, evidence of which can be seen in the minutes of the meeting, which were leaked to a Polish NGO.

First and foremost, it is not clear whether the decision to appoint Przylebska as Commissioner overseeing selection of the new President of the CT was countersigned by the Prime Minister, as required by law. Minutes from the meeting show that Judge Zubik requested an explanation on this issue, to which Muszynski responded that Duda's order to appoint Przylebska was countersigned electronically. However, no proof was offered, obliging the judges to continue on the basis of this word-of-mouth assurance that the document had been signed.

The second controversy was raised by Judge Pszczółkowski. Despite being a former Member of Parliament for PiS, he produced a long letter to Przylebska in which he explained that the meeting was null and void without the presence of Judge Rymar. This argument had already been raised by all judges, including Biernat. Pszczółkowski elaborated that by eliminating the requirement for a quorum for selecting the candidates, the temporary legislation inadvertently creates the requirement for all judges to vote on presenting the judges to President Duda. That last requirement was not met, as Judge Rymar was absent.

Finally, instead of two ballots (one for selection of the candidates and another for presenting them to President Duda), Przylebska decided to have only one (on selection of the candidates). Przylebska presented the results of this single ballot to President Duda as the resolution of the Election Meeting. This is clearly an egregious procedural error: the second resolution should be taken by all the judges, not by Przylebska alone.

The consequence is that Przylebska's status as the President of the CT can be legally questioned. This throws further doubt on her professional capacity to fulfil the role, most clearly evidenced in her issuing power of attorney to Muszynski to substitute for her in presidential duties. This unprecedented use of power of attorney has been broadly criticized by experts as a *de facto* abdication from the role.

For the time being, the crucial issue is the reaction of the "old" judges to the decisions by Przylebska to allow the anti-judges to sit on the panels. Yesterday, Judge Rymar sent a clear signal that he will not accept the illegally elected anti-judges in his panels, after discovering that Muszynski sits on his panel instead of Przylebska. He adjourned the relevant hearing indefinitely. This form of passive resistance has been welcomed by commentators disappointed by the lack of official resistance in December.

Nonetheless, the prospects for Poland's constitutional court look grim. Przylebska's actions serve to diminish its authority, and the participation of the anti-judges in the panels jeopardizes the legality of its verdicts. This is probably what Law and Justice wanted to achieve: it is much easier to govern without a strong constitutional

court.

---

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Matczak, Marcin: *Poland's Constitutional Tribunal under PiS control descends into legal chaos*, *VerfBlog*, 2017/1/11, <http://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/>.